Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

SHEA ZELLWEGER and ALEIDA H. ZELLWEGER,

Petitioners,

v.

THE CITY OF ALLIANCE, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEALS, STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the requirement of the federal constitution, which dictates that the exercise of the power of eminent domain be for a "public use," is satisfied when eminent domain is utilized pursuant to the authority of a municipal corporation, through contract, in furtherance of the business interests of a private corporate entity.

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Petitioners, Shea Zellweger and Aleida H. Zellweger, respectfully petition this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for Stark County, Ohio, Fifth Appellate District entered in this action on March 12, 2001, which affirmed the judgment of the Court of Common Pleas, Probate Division, Stark County.

OPINIONS BELOW

The opinion and judgment entry of the Fifth District Court of Appeals for Ohio affirming the judgment of the Common Pleas Court of Stark County, Ohio is reproduced in Appendix A at 1a (March 12, 2001). The entry of the Supreme Court of Ohio denying jurisdiction is reproduced in Appendix C at 41a (June 27, 2001). The findings of fact and conclusions of law of the Stark County Court of Common Pleas is reproduced in Appendix B at 23a (May 31, 2000). The decisions rendered in this case are, thus far, not published.

STATEMENT OF JURISDICTION

The judgment of the Fifth District Court of Appeals was entered on March 12, 2001. A timely appeal was pursued to the Ohio Supreme Court, and that highest court of review for Ohio declined jurisdiction in this case. The order of the Supreme Court of Ohio was entered on June 27, 2001. The jurisdiction of the United States Supreme Court rests upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves matters of substantive due process as guaranteed by the Due Process Clause of the United States Constitution, U.S. Const. Amend. V and by U.S. Const. Amend. XIV. At issue are provisions of the Ohio Constitution, Article I, Sec. 19 and Article XVII, Sec. 3 and Section 719.01, Ohio Revised Code. Relevant provisions thereof are reproduced in Appendix D at 42a.

STATEMENT OF THE CASE

A. Procedural History

This case originated on August 29, 1999, with the filing of a Complaint for Eminent Domain in the Stark County Common Pleas Court, Probate Division, State of Ohio. The petitioners were the defendants below, namely, Shea Zellweger and Aleida Zellweger. Respondent, the City of Alliance, Ohio, was the plaintiff below.

The complaint purported to assert claims for eminent domain, but did not identify any Constitutional provisions or laws of the State of Ohio for that purpose. It alleged that it was necessary to obtain the home and land of the petitioners by eminent domain for urban renewal and development, creation and preservation of jobs and employment opportunities and to improve the economic welfare of the people and the construction of a new and expanded hospital for a private corporation.

B. Course of Proceedings

The petitioners filed a motion for dismissal of the complaint under the United States Constitution and the Ohio Constitution. The trial court denied such motion. A hearing on the necessity for the appropriation proceeded from December 10, 1999 through December 16, 1999. At the hearing on necessity, in the Stark County Probate Court, petitioners presented testimony from the City's public officials that the Resolution of Necessity was not served in the manner provided by law, there were no negotiations, there was no blighted or slum areas involved and there were no plans for urban redevelopment adopted by the City and that the interest of the City in the hospital had been sold to a private corporation without recourse.

The trial court found that necessity existed on December 21, 1999 and denied a motion for findings of fact and conclusions of law. The case was tried before a jury with petitioners receiving $125,000. A judgment entry was issued on March 18, 2000. A notice of appeal to the Ohio Fifth District Court of Appeals was timely filed on March 31, 2000. The trial judge issued findings of fact and conclusions of law on May 31, 2000. During the span of the proceedings in this case, petitioners have maintained and developed a record based upon the proposition that the proceedings were unconstitutionally void due to the arbitrary and capricious action taken under the guise of eminent domain.

The Fifth District Court of Appeals rendered its memorandum opinion and judgment entry affirming the Court of Common Pleas, Probate Division, Stark County, Ohio that the City's utilization of eminent domain, through the private corporation, to improve the private hospital facilities for the good of the Alliance public was not an

unconstitutional act. Furthermore, while the private corporation was open to the public, has a virtual monopoly in the area in which its operates, and is non-governmental in its operations, it acts in a fiduciary capacity for the public according to the appellate court. It was further held that the absence or non-existence of urban blight or slum area is merely academic when appropriation was a means of promoting the public purpose of maintaining a private hospital in the City. The opinion of the Fifth District Court of Appeals was filed March 13, 2000. On a timely appeal to the Ohio Supreme Court filed by petitioners, the Ohio Supreme Court declined jurisdiction to hear the case through its entry dated June 27, 2001.

C. Statement of Facts

The City of Alliance, hereinafter referred to as the "City," leased the Alliance Community Hospital to the Alliance Citizens Health Association, a private corporation. The corporation has no right of eminent domain. The corporation, through convoluted contracts, fulfilled the City's desire for a new jail and Justice Center by purchasing the land, buildings, fixtures, equipment and personal property for $4,177,000. In return for this "bowl of porridge," the City agreed to exercise its statutory right of eminent domain for the private corporation in order to allow the Health Association to obtain additional surrounding properties for the construction of a hospital, nursing home, and wellness center.

As part of the bargained for consideration of sale, the City's Council passed Resolution No. 15-99, declaring the necessity to appropriate the title to the petitioners' property. The stated purposes were for urban renewal and development, create and preserve jobs, improve economic welfare and

construction of a new and expanded health care facility. The Resolution directed the Mayor or such person as she may designate to give notice of the Resolution to the petitioners and make return of the service.

The City's Council passed Ordinance No. 118-99 after the property sale to a private corporation of the land had been completed, wherein it directed the Law Director to file a petition for appropriation against the petitioners to obtain their properties by eminent domain. The stated purposes differed from Resolution 15-99 in that they were for urban renewal and development, creation and preservation of jobs and employment opportunities and to improve the economic welfare of the people and specifically for the construction of a new and expanded "hospital" in accordance with Alliance City Ordinances and laws. These ordinances and laws were not identified in the ordinance or the City's complaint filed on August 29, 1999.

The hearing on the necessity for the appropriation instituted proceeded from December 10, 1999 through December 16, 1999. With just two days notice, the respondent City was permitted to conduct a telephone and videotape deposition of a witness in San Francisco, California on December 8, 1999, which was less than two (2) days before the commencement of the trial, to testify for the construction of an acute health care facility consisting of a wellness center, nursing home and hospital. A request for a protective order was summarily dismissed. This was the first and only attempt to share previously unknown plans with petitioners and City officials including the Mayor, Safety-Service Director, Planning Administrator and six councilmen.

At the hearing on necessity, in the Stark County Probate Court, petitioners presented testimony from the City's public officials that the Resolution of Necessity was not served in the

manner provided by law, there were no negotiations, there was no blighted or slum areas involved, there were no plans for urban redevelopment adopted by the City and the City had sold its interest in the hospital to a private corporation without recourse.

The evidence indicated that the land subject to appropriation was not located in an area which was blighted or had been determined to be a slum by the City's official actions and there was no credible evidence to support any speculation that a blighted area existed in the vicinity of the private corporation's land. The respondent City admitted that the land was to be used by a private corporation known as the Alliance Citizens Health Association. The private corporation was to use the land — not the City. The lack of public use as demonstrated by the absence of any redevelopment plans provide the only explanation as to the reason that no public official had any knowledge of the use of the property subject to eminent domain.

Upon the record of arbitrary and capricious action of the respondent City of Alliance, this case is now before this Honorable Court, and a writ of certiorari for further review is respectfully requested.

REASONS FOR GRANTING THE WRIT

SUMMARY

The expansive trend of eminent domain under state welfare action favoring economic development and the promised flow of economic benefit to those political subdivisions advancing this trend has started down a dangerous and slippery slope in violation of the inviolate property rights cherished by our Founding Fathers. All three authors of the Federalist Papers uniformly agreed in the inviolability of property and that protection of private property was a basic guarantee of individual liberty and of orderly society.

John Jay, in negotiating the Treaty of Peace with Great Britain through Lord Shelburne (which document confirmed our Declaration of Independence) set the stage for his protégé, Alexander Hamilton's most famous case, *Rutgers v. Waddington*. Jay, New York's preeminent lawyer and George Washington's most competent Secretary of Foreign Affairs, pledged in the Treaty of Peace to have the States revise legislation confiscating Tory property and honoring legitimate debts due British merchants.

The confiscation of Tory properties continued by the victors through the New York Trespass Act, and Hamilton took up the then unpopular position of advocating the Tory property rights in *Rutgers v. Waddington*, New York Mayor's Court, Feb. 1784. His arguments were visionary:

> 1) A State legislature can't preempt the Treaty of Peace entered into by our Congress acting under the Articles of Confederacy — the future Supremacy Clause; 2) a state law made in violation of a treaty of Congress is "unconstitutional" (the choice of "unconstitutional" being a three-year premature drafter's embellishment, but I know of no word as "unconfederational" or being in difference to the principles of the short-lived Articles of Confederation as viewed by Hamilton); and 3) the Mayor's Court has jurisdiction to review and determine — a future precursor of *Marbury vs. Madison*;

but of essence in *Rutgers* was the simple principle that the state cannot confiscate private property even of our former enemies in violation of law even if popular and sanctified by state action.

The final and definitive vote on the right to hold property free from confiscation by state action comes from our third Federalist author, James Madison, with the adoption of his Fifth Amendment:

> No person . . . ; nor shall private property be taken for public use, without just compensation.

The current trend of such state action, and in particular the egregious sale of that right to a private corporation for a non-public use in the case before this Court, is at substantial difference from our Constitution and the principles upon which it is founded.

There are established preconditions that must be satisfied to meet the legal requirements for "public use." This case involves an arbitrary and capricious expansion of appropriation through eminent domain by a political subdivision of a state within our Federal Union whereby a citizen's home situated within that State is taken without a "public use" and solely to fulfill a contract benefitting a private corporation possessing no such power of eminent domain. Such action violates a fundamental and inviolate right guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution, to wit: that no such taking occur without a "public use."

That fundamental requirement of "public use" cannot be fulfilled by having the private corporate beneficiary pay through contract into the public subdivision's treasury a few pieces of gold and thereafter attempt to justify the taking by transposition of the citizens' older but non-blighted homes in exchange for pretty, new private corporate hospital buildings.

If a single municipal corporation can decide property ownership upon its view of who can place the property to more productive use, the inalienable right to own and enjoy property will pass to a favored and privileged elite. The Ohio court of appeals ignored the plain meaning of a "public use" to benefit a private corporation in this case.

The court of appeals' decision extends and distorts the "public use" doctrine to take private property to an extent that it becomes impossible to predict its furthest implications. Will it be applied to private corporations — Microsoft, IBM or Chase-Manhattan Bank — which have billions of dollars available to obtain private property which the owners do not wish to sell or be limited to private colleges and religious organizations with smaller endowments but who have the funds to enrich public municipal budgets. This Court should accept review of this case, in order to stop the inappropriate and boundless expansion of the power of eminent domain threatened by this case.

ARGUMENT

THE REQUIREMENT OF THE FEDERAL CONSTITUTION, WHICH DICTATES THAT THE POWER OF EMINENT DOMAIN BE FOR A "PUBLIC USE" IS NOT SATISFIED WHEN EMINENT DOMAIN IS UTILIZED UNDER THE AUTHORITY OF A MUNICIPAL CORPORATION, THROUGH CONTRACT, IN FURTHERANCE OF THE BUSINESS INTERESTS OF A PRIVATE CORPORATE ENTITY.

The Ohio court of appeals in its opinion found that the respondent City's conclusion to allow for expansion of a vital medical institution, serving the public's needs, satisfied

constitutional bounds, when the facts before the court indicated that the City had sold, through an intermediary, all land, buildings, fixtures, equipment and personal property owned by the City for $4,177,000 to the private health association and had agreed to acquire additional land for the same corporation by the use of eminent domain.

There was a challenge made to the method devised to complete the sale of the public assets, wherein the petitioners presented to the Ohio court of appeals evidence that there is no legal authority wherein the municipal corporation could agree to sell its statutory authority to institute appropriation proceedings for a private corporation upon payment of consideration.

The Ohio Constitution (Article I, Section 19) requires that where private property is taken for public use compensation must be paid, and (Article XVIII, Section 3), upon the exercise of the powers of local government, a municipality may not exercise its powers in conflict with the general laws. Section 719.01, Ohio Revised Code cited by the court below, does not authorize a municipal corporation to invoke its power of eminent domain for compensation or a fee. There is a further fundamental requirement that the power of eminent domain be exercised for a public use (Fifth Amendment), and that the power be exercised by the states under process of law (Fourteenth Amendment), as dictated by the United States Constitution.

The exercise of the powers of eminent domain are limited powers to be strictly construed under both the Federal Constitution, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Cincinnati v. Vester*, 281 U.S. 439 (1929); and the Ohio Constitution, *O'Neil v. Board of County*

Commissioners, 3 Ohio St. 2d 53 (1983); *Snyder v. Board of Park Commissioners*, 125 Ohio St. 336 (1932); and *City of East Cleveland v. Nau*, 124 Ohio St. 433 (1931). The lower courts of Ohio have indicated that a judicial inquiry must be made that the law has been strictly followed when there is legislation authorizing the taking. *Eighth & Walnut Corp. v. Public Library*, 57 Ohio App. 2d 137 (1977); *City of Dayton v. Keyes*, 252 N.E. 2d 655 (1969); *Blakemore v. C.M. Housing Authority*, 74 Ohio App. 5 (1943). The appellate court in *Eighth & Walnut Corp. v. Public Library*, cited the absence of statutory authority as its reason for denying a municipal corporation the power to appropriate land for a county free public library.

None of the citations of authority offered by the court below dealt with exercise of eminent domain by a municipality when consideration was paid by the private corporation for whom it was being exercised. The consideration paid by the private corporation was for the public property sold and the use of the appropriation powers to acquire additional lands for the same corporation. There was not an attempt by the Ohio court of appeals to segregate the payment made for the two separate purposes.

In *Berman v. Parker*, 348 U.S. 26 (1954), cited as authority in the appellate court's opinion, the facts therein do not support its reasoning. Congress, which governed the District of Columbia, had passed a District of Columbia Redevelopment Act of 1945 which was designed to eliminate substandard and blighted areas in the District, acquire such real estate, and then lease or sell it for redevelopment. A board was established to implement the standards in the statute. The Supreme Court found that once Congress had established the standards in determining the slum or blighted areas, the implementation thereof by eminent domain

in the District within those standards was properly handled and supported by factual findings developed through hearing, and thus did not violate the due process clauses of the Federal Constitution. No such procedure was followed by the respondent City of Alliance in this case.

The object of the authority of the municipality to exercise any powers of eminent domain has been set by the requirement in Article XVIII, Section 3, Ohio Constitution, that it conform to the general laws of the state. The Ohio General Assembly has never given the power to a municipality to allow a private corporation to pay for the exercise of appropriation of property. Unlike the factual circumstances in *Berman v. Parker*, where Congress is the governing authority for the District of Columbia under the United States Constitution, there are no facts which are similar in the instant case. The rationale used by the Ohio court does not apply to the facts set forth in this case, where a private corporation has bought the municipality's power to appropriate property.

In *Hawaii Housing v. Midhiff*, 467 U.S. 229 (1984), this court upheld the exercise of eminent domain by the State of Hawaii to eliminate the evils related to land ownership by a small number of persons whose title was derived from the Hawaii monarchy — referred to as "oligophy." As the court indicated, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the public use clause." *Id.* at 244. The City has not been granted the authority under Section 719.01, Revised Code to appropriate land for a private hospital. The stated purposes of the Ohio statute were not related to the reduction of the perceived social and economic evils of a land ownership as was found in *Hawaii Housing v. Midhiff.*

The Council of the City of Alliance derives its authority for eminent domain from the statutes passed by the General Assembly subject to the limitations of the Ohio Constitution. The City does not have the power — UNLIKE THE CONGRESS — to decide the means by which the object is to be attained. The Council of the City of Alliance has to exercise its powers subject to the general laws of the General Assembly, and the City cannot cite any precedent granting it the authority to accept consideration in exchange for the use of the power of eminent domain.

The issues of the government's condemnation to make a grant for the sole benefit and economic advantage of a single property owner has been considered by the highest courts of several states. However, no request was ever made for a review by this court. The Supreme Courts of Kansas and Illinois have upheld the taking of property to be turned over to racetracks. *State ex rel. Tomasic v. Unified Gov't. of Wyandotte Co.*, 265 Kan. 779, 962 P.2d 543 (1998); *Southwestern State Rev. Auth. v. Nat'l. City Envtl.*, 254 Ill. Dec. 748, 748 N.E. 2d 194 (2001). The latter case is again before the Illinois Supreme Court upon the allowance of a *petition for rehearing*, 2001 Ill. LEXIS 749. The Michigan Supreme Court allowed a taking of property for new Fisher Body and Cadillac assembly plants in *Poletown Council v. Detroit*, 410 Mich. 616 (1981) with dissents citing opposition authority throughout the Untied States (*Id.* 636 to 685). The decision of the Supreme Court of Indiana in *Rerloshon v. City of Fort Wayne*, 250 Ind. 163; 234 N.E. 2d 269 (1968) held that private property could not be taken for a steel mill. The case did not thereafter involve a request for a writ of certiorari.

It is well-established that both the Ohio and the United States Constitutions require the power of eminent domain be exercised for a "public use." Section 19, Article 1, Ohio Constitution; Fifth Amendment and Fourteenth Amendment, U.S. Constitution; *City of Huron v. Hanson*, Erie App. No. E-99-060 (July 28, 2000), unreported. This was expressly recognized by the Ohio court of appeals below. (Op. pp. 9-10). However, in this case, the appellate court's strained determination that some public purpose was advanced by the respondent's exercise of eminent domain cannot stand scrutiny, as addressed below.

A close reading of the *Huron v. Hanson* case, cited by the court of appeals, reveals that it actually supports the petitioners positions in this case and, to the contrary, does not support the appellate court's decision or rationale.

In *Huron v. Hanson*, the appellate court affirmed a permanent injunction in favor of the landowners on an eminent domain claim pursued by the City of Huron. The city brought the appropriation case seeking to take property for the purpose of providing an access road to private Wendy's Restaurant, since the city believed is was liable to the restaurant owner to provide such access. The trial court held that the appropriation in this case violated Article I, Section 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because the appropriation was not done for a public purpose and was not necessary. Again, the court of appeals affirmed the permanent injunction issued in *Huron v. Hanson*.

Similarly, in the instant case, the Ohio Appellate Court should have determined that, in the absence of a legitimate, actual "public use" (as opposed to a purpose designed to benefit

a private entrepreneur), the power of eminent domain is not available. As observed in *Huron v. Hanson*, there "also may be some incidental private use so long as the primary purpose of the appropriation is for public use." Citing, *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, Syl. ¶ 4 (1953). In this case, the primary purpose behind the respondent's exercise of its eminent domain power was to benefit the private interests of the hospital with whom the City had contracted. The power of eminent domain was not exercised for a proper public purpose and, thus, was not lawfully invoked here.

The court of appeals' reliance upon *Gotsis v. Lorain Community Hospital*, 46 Ohio App. 2d 8 (1974) and *Davidson v. Youngstown Hosp. Assn.*, 19 Ohio App. 2d 246 (1969) is similarly misplaced. Neither of these cases has anything to do with eminent domain and, consequently, neither case supports the court of appeals' opinion. This is presumably why the appellate court offers no analysis of either *Gotsis* or *Davidson*, or the out-of-state authority relied upon therein.

In the *Gotsis v. Lorain Comm. Hosp.* case, which merely followed the similar *Davidson* case, the question presented was whether the termination of a physician's privileges by a nonprofit corporation, a private hospital association, indicated state action for purposes of constitutional due process requirements. The court held that the hospital's action was not "state action." The court reached this conclusion that there was no state action because the hospital was not "public," in the governmental sense, regardless of the fact that the hospital was, of course, open to the public. The decision reads, in pertinent part:

> [B]eing "open to the public" does not mean that the hospital is public in the sense of governmental action, nor is it, in fact, performing an ordinary function of the government.

Gotsis v. Lorain Comm. Hosp., *supra* at p. 16 (citations omitted).

Application of this rule to the facts in this case produces the following conclusion; that the hospital association involved in this matter, while "open to the public" is not public — it is not "performing an ordinary function of the government." Consequently, the benefit to the private association through this use of eminent domain is not a lawful public use as required by well-established eminent domain law.

The fact that a private hospital as in Gotsis and Davidson, previously cited, as well as in *Greisman v. Newcomb Hospital*, 40 N.J. 389 (1963), and *Woodard v. Porter Hospital*, 125 Vt. 419 (1966), were determined by the Ohio court to have a fiduciary capacity for the public does not pertain to eminent domain law or to the facts of this case. That fiduciary capacity only means that the decision to terminate a physician's privileges may by reviewed by the courts under the standard of arbitrary, capricious or discriminatory conduct. This most-limited fiduciary capacity does not, in any sense, grant the private hospital the power to exercise eminent domain or serve as the foundation for eminent domain to be used by a municipality on its behalf and for its interests.

The stated purpose of both the Resolution of Necessity and the Ordinance to Appropriate adopted by the City Council,

although for different projects, was purportedly for urban renewal and redevelopment:

> Resolution of Necessity to Appropriate on February 1, 1999 — ". . . urban renewal and development . . . construction of a new and expanded health care facility."
>
> Ordinance to File Petition for Appropriation on August 16, 1999 — "urban renewal and development . . . for the construction of a new and expanded hospital."

The lower courts treated the stated purposes of "urban renewal and development" as being merely academic in that the appropriation was viewed as a means of maintaining a hospital in the City as a public purpose "EVEN IN THE ABSENCE OF BLIGHT." (Emphasis added). The Ohio court overruled three assignments of error relating to urban blight or slum clearance as being "MOOT." The same rationale of mootness was recited as applying to the City's reversionary interest in the properties in question.

The presence of blighted and slum properties was the principal reason for the City's declared purpose in its legislation. The City did not argue or brief the rationale used by the lower court that eminent domain could be exercised for the benefit of a private corporation due to a fiduciary relationship to the public entity — although as has been previously stated, none of the cases made such a decision relating to the use of eminent domain but used the fiduciary relationship as a basis for the exercise of jurisdiction in disputes between health care associations and their professional staff. The respondent City relied entirely upon the presence of urban blight and the presence of slums to justify the use of its power of eminent domain.

The Ohio Supreme Court, in *State ex rel. Bruestle v. Rich*, *supra*, determined that the City of Cincinnati had passed

ordinances to eliminate slum conditions and then clear the land to avoid such recurrence. The Cincinnati Council had adopted an ordinance with a plan for redevelopment. It was the presence of these procedures and the existence of blight or slum conditions which led the Court to hold that eminent domain could be used to implement them. These pre-conditions as set forth in *Bruestle* were not present as to the properties in this case. The City was required to define specifically by legislation a purpose of appropriation so as to sustain necessity under Article XVIII, Section 10 of the Ohio Constitution. *City of East Cleveland v. Nau, supra*. The facts demonstrated that no slums or blighted area was involved and that the City had no development plan so that the law as set forth in *Bruestle* results that no legitimate public purpose existed. Where the appropriating authority has failed to make a determination of the existence of a blighted or slum area, it lacks authority to institute eminent domain for urban renewal. *Eighth & Walnut Corp. v. Public Library of Cincinnati*, 57 Ohio App. 2d 137 (1977). As was said in *Eighth & Walnut Corp.*:

> To hold otherwise would involve a wholly unwarranted extension of the power of eminent domain, which remains despite its frequent application and broader usage in recent times, a power whose statutory expressions are to be strictly construed. *City of Cincinnati v. Vester* (1930), 281 U.S. 439, 448; *Pontiac Improvement Co. v. Bd. of Commissioners* (1922), 104 Ohio St. 447, 454-455.

Id. at 140.

The Ohio court's reliance upon the decision of this Supreme Court in *Berman v. Parker*, 348 U.S. 26, 99

L. Ed. 27 (1954) can not be sustained due to the factual differences which are present in that federal situation and the current one. Congress which governed the District of Columbia had passed a District of Columbia Redevelopment Act of 1945 which was designed to eliminate substandard and blighted areas in the District, acquire such real estate, and then lease or sell the property for redevelopment. The implementation was undertaken by the District government by its factual finding. The object to eliminate slums was within the authority of Congress and, thus, lawful. The means to attain the object — also within the authority of Congress — was implemented by the District government through hearing and factual findings of the existence of slums or blighted areas. In the instant case, the City declared an object — "urban renewal and development" — but was unable to sustain by factual means the existence of such object. The City further lacks the power to implement means which have not been given to it by the General Assembly which is the equivalent of the Congress in Ohio. The Stark County Common Pleas Court found that the petitioners' property, in the general area subject to eminent domain proceedings ". . . *is not blighted or slum area.*" (Emphasis added). The Fifth District Court of Appeals' conclusion was made "*even in the absence of blight.*" (Emphasis added). A copy of the Common Pleas Court's findings of fact is contained in Appendix C and illustrates on its face the contrast between the conclusions of the Ohio courts in this case.

This Court indicated in *Hawaii Housing Authority v. Midhiff*, 467 U.S. 229 (1984) that there must be a justifying public use to take one person's property for the benefit of another private person, even if that person is a corporation (remedy a perceived social and economic evil of a land oligopoly). The respondent City had no public purpose since the

Ohio legislation had never granted the power in Section 719.01 to acquire land for a private corporation for a hospital.

The petitioners met the legal burden imposed upon them by Ohio Court's decision in *Bruestle* and this Court's decision in *Berman* when they demonstrated that the respondent City's purpose of removing blight or urban decay, when it undertook eminent domain on behalf of the private corporation, was not legitimate, inasmuch as no slums or blighted area existed and the City had no redevelopment plan. The decision of the Ohio court of appeals below should not be permitted to stand.

CONCLUSION

For the reasons set forth above, this case presents a substantial constitutional question for this Court's review. It is time for this Court to check the expansive use of eminent domain and reaffirm the inviolate private property rights of our citizens.

Our founding fathers created the most enuring compact assuring self government and justice and subsequently added by amendment the protection of private property to the Bill of Rights — "nor shall private property be taken for *public use*, without just compensation."

The petitioners, Shea and Aleida H. Zellweger, have had their home taken by the City of Alliance for the benefit of a private corporation. In exchange for payment the respondent City sold its power of eminent domain to be used against its own citizens and residents. The federal and Ohio cases have embodied the theory promulgated by the John Locke's basis of representative government that where a private landowner relinquishes his property to the government, it must be the public

who obtains the benefit of the bargain as a third-party beneficiary, not a private corporation which desires increased monetary benefits. Eminent domain is a constitutional power which should not be subject to public sale.

WHEREFORE, the petitioners, Shea Zellweger and Aleida H. Zellweger, respectfully request this Court issue a writ of certiorari to review the judgment and opinion of the Ohio Fifth District Court of Appeals entered in this action on March 12, 2001.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE FIFTH APPELLATE DISTRICT, STARK COUNTY, OHIO DATED MARCH 12, 2001

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case Nos. 2000CA00093 and 2000CA00094

THE CITY OF ALLIANCE,

Plaintiff-Appellee

– vs –

SHEA and ALEIDA H. ZELLWEGER;
RONALD and JANET DUNLAP,

Defendants-Appellants

OPINION

March 12, 2001

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Probate Division, Case Nos. 173863 and 173864
JUDGMENT:	Affirmed

* * *

Appendix A

Wise, J.

Appellants Shea and Aleida Zellweger, and Ronald and Janet Dunlap, appeal the decision of the Stark County Court of Common Pleas, Probate Division, which granted judgment in favor of Appellee City of Alliance ("the city") in an action for appropriation of real estate. The relevant facts leading to this appeal are as follows.

In September 1997, representatives of the Alliance Community Hospital commenced meetings with the architectual firm of Kaplan McLaughlin Diaz, regarding plans for new and expanded medical facilities. The firm subsequently prepared a report focusing on three alternatives, one of which contemplated using the existing urban hospital site near the Mount Union College campus, and two of which contemplated moving to other sites. In early 1998, the hospital announced to the public the pending alternatives for expansion.

The City of Alliance took an interest in the hospital's expansion plans, and undertook steps to encourage maintaining the hospital at its current location. Among other concerns, the city worried that the vacant hospital structures would not attract new tenants, and that the centralized accessibility of the facility to urban residents would be lost. City councilman Mike Ogline was appointed to the Board of Hospital Commissioners, and subsequently took extensive steps to review various proposals on the subject and analyze the impact thereof.

Ultimately, the hospital decided to pursue expansion at its present location. After further study, the hospital

concluded that approximately twenty acres of land would be needed for its plans. The desired areas included property tracts owned by Appellants Zellwegers and Dunlaps.[1]

On October 26, 1998, City Council enacted Ordinance No. 119-98S, which authorized the sale of the city's interest in the hospital land and facilities to the Alliance Community Hospital Association ("ACHA"), a community improvement corporation, for the minimum sum of $4,177,000. City Council designated the Greater Alliance Development Corporation ("GADC") to act as the city's agent in the transaction. The ordinance required that the deed of transfer contain a reversionary interest for the city if ACHA should fail to operate a hospital within the corporate limits of the city or ACHA should fail to expend a sum certain on construction within three years from the date of title conveyance. GACD entered into a sales agreement January 6, 1999, conditioned on the city's successful acquisition of the desired adjoining properties.

On February 1, 1999, City Council adopted resolution No. 15-99, which declared a necessity and an intent to appropriate real estate adjacent to the hospital, including the aforementioned Zellweger and Dunlap properties, for purposes of urban renewal and redevelopment, to create jobs, and specifically for the construction of an expanded health care facility.

---

1. Documents at the commencement of the action asserted that the Dunlaps were vendees under a land installment contract with Anna Sheriff.

Appendix A

On February 16, 1999, City Council adopted resolution No. 21-99, which approved a redevelopment agreement between the city and ACHA. The city transferred its interest in the hospital to ACHA on March 26, 1999, using the GADC as agent.

On August 16, 1999, City Council enacted ordinance No. 118-99, stating that the city had been unsuccessful in obtaining real estate referred to in resolution 15-99, and therefore, authorizing the appropriation of said real estate for the aforementioned purposes.

On August 30, 1999, the city filed a petition in the Stark County Probate Court in order to appropriate the properties at issue.[2] A pretrial was conducted on November 30, 1999. At various times from December 10, 1999 through December 16, 1999, the trial court heard arguments and evidence on the issue of the necessity of the appropriation. Judgment entries were issued on December 21, 1999, finding that a necessity existed for the exercise of eminent domain by appellee and admitting certain exhibits.

The matter of compensation for the appropriation was heard before a jury beginning February 28, 2000. The jury rendered verdicts of $125,000 each in favor of the Zellwegers and the Dunlaps. Judgment entries based on the verdicts were entered on March 3, 2000. Appellants jointly filed a motion to disqualify the trial judge on March 31, 2000, which was

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2. The trial court proceedings addressed no less than four parcels and owners, under four different case numbers. The within appeal concerns just the two properties owned respectively by the Zellwegers and the Dunlaps.

denied. The trial judge also issued findings fact and conclusions of law on March 31, 2000.

Both appellants timely filed notices of appeal. Appellants Zellwegers herein raise the following Assignments of Error:[3]

I. TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY HAD COMPLIED WITH THE STATUTORY AND ORDINANCE REQUIREMENT FOR GIVING NOTICE TO THE DEFENDANTS OF ITS INTENT TO APPROPRIATE PROPERTY WHICH CONSTITUTED A DENIAL OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16, TO THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED WHEN IT MADE A FINDING OF FACT THAT IF THE HOSPITAL WOULD ABANDON ITS CURRENT CAMPUS THEN THE EXISTING BLIGHTED AREAS TO THE NORTH AND EAST WOULD CREEP TOWARD THE HOSPITAL.

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3. Appellants Dunlaps raise identical Assignments of Error as to their property, except that they delete Zellwegers' first Assignment of Error, and add one of their own, which we will separately address.

III. THE TRIAL COURT ERRED WHEN IT MADE [A] CONCLUSION OF LAW THAT CONTAINED CONTRADICTIONS AS TO THE FACT [SIC] AND LAW ON THE ISSUE OF THE EXISTENCE OF URBAN BLIGHT AND URBAN SLUMS.

IV. THE TRIAL COURT ERRED WHEN IT MADE CONCLUSIONS OF LAW THAT THE CITY COULD ACQUIRE LANDS BY EMINENT DOMAIN FOR ITS HOSPITAL AFTER IT HAD MADE FINDINGS OF FACT THAT THE CITY HAD SOLD ITS INTEREST IN ALL LAND, BUILDINGS, FIXTURES, EQUIPMENT AND PERSONAL PROPERTY IN THE SAME HOSPITAL TO THE ALLIANCE CITIZENS HOSPITAL ASSOCIATION, INC., WHICH CONCLUSIONS WERE CONTRARY TO [THE] OHIO AND FEDERAL CONSTITUTIONS.

V. THE TRIAL COURT ERRED WHEN IT FOUND THAT WHILE THE ZELLWEGER'S PROPERTY WAS NOT A BLIGHTED OR SLUM AREA, IT WAS STILL SUBJECT TO APPROPRIATIONS FOR TRANSFER TO A PRIVATE CORPORATION FOR PRIVATE REDEVELOPMENT CONTRARY TO THE CONSTITUTION OF OHIO AND DECISIONS OF THE OHIO COURTS.

VI. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY HAD BY MEANS OF REVERTER A PRESENT AND FUTURE INTEREST IN THE LAND CONVEYED ON MARCH 26, 1999, TO THE ALLIANCE CITIZENS HEALTH ASSOCIATION, INC., THRU (SIC) THE GREATER ALLIANCE DEVELOPMENT CORPORATION.

VII. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO RECUSE HIMSELF UPON MOTION QUESTIONING THE IMPARTIALITY OF SUCH TRIAL JUDGE PRIOR TO THE TRIAL ON NECESSITY.

Appellants Dunlaps add the following Assignment of Error, which they place as number six in their table:

VI. THE TRIAL COURT ERRED WHEN IT DEDUCTED A COMMISSION OF $1,350.00 FOR THE PROBATE COURT UNDER SECTION 2303.20(V), OHIO REVISED CODE, FROM THE JUDGMENT ENTRY OF DISTRIBUTION TO RONALD A. DUNLAP AND JANET L. DUNLAP ON JUNE 14, 2000.

As a preliminary matter, we are compelled to analyze the effect on this appeal of the appellants' acceptance of their compensation monies. Generally, "a satisfaction of judgment

renders an appeal from that judgment moot." *Spencer v. Kiowa Developing Co., Inc.* (Jan. 5, 2000), Summit App. Nos. 19524, 19532, unreported, quoting *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 245. However, given the nature of eminent domain proceedings, this rule has not been applied to these types of cases, as noted in the following:

> It is now argued that because of the receipt by [landowner] Albert O. Kraemer of the money so paid into court he must be deemed to have accepted the result of the trial below, notwithstanding this proceeding in error, which thereby becomes a moot case and should be dismissed. Under Section 3695, General Code, there is distinct authority given to the board of education upon the entry of a judgment to pay in the money and take possession of the land. While no express authority is set out in the statute for the withdrawal of the money by the property owner, it is clear that it was paid into court for his benefit as an equivalent for his land which is at once taken for public use. No provision is made for payment of any interest upon the money or its investment for his benefit. As he has lost his land, he at once becomes entitled to the money paid as its equivalent. If it should ultimately be determined not to be the proper amount, security given by each of the parties insures the proper final adjustment. The fact that he has received the money so paid in no way prevents his insistence upon any rights he may have or interferes with the prosecution of this error proceeding. * * *.

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Kraemer v. Board of Ed. of Cincinnati (1917), 8 Ohio App. 428, 431.

Kraemer referenced an 1882 ruling by the Ohio Supreme Court, which, although addressing appropriation by a non-governmental railroad under prior Section 6414 of the Revised Statutes, held that "[t]he deposit of money in court, is in legal effect, for the land-owner's use, and belongs to him, as soon as the land becomes the property of the corporation [citation omitted]. And this is so notwithstanding either party may prosecute error and reverse the judgment." *Wagner v. Railway Co.* (1882), 38 Ohio St. 32, 36. In light of the modern statutory language in R.C. 163.19, to the effect that "* * * the right to take and use the property appropriated shall not be affected by such review by the appellate courts," we find the rationale of *Kraemer* permits us to proceed to the merits of the present appeal.

I.

In their First Assignment of Error, Appellants Zellwegers assert a violation of due process in the method of notice of proceedings which the trial court permitted. We disagree.

Appellants base their argument on R.C. 719.05, which directs notice requirements by municipal corporations in appropriation matters:

> The mayor of a municipal corporation shall, immediately upon the passage of a resolution under section 719.04 of the Revised Code, declaring an intent to appropriate property, for

> which but one reading is necessary, cause written notice to be given to the owner of, person in possession of, or person having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent. Such notice shall be served by a person designated for the purpose and return made in the manner provided for the service and return of summons in civil actions. If such owner, person, or agent cannot be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the municipal corporation, and the legislative authority may thereupon pass an ordinance by a two-thirds vote of all members elected thereto, directing such appropriation to proceed.

The Zellwegers argue that the above statute was violated in that notice was not served "immediately," that notice was not served by the proper individual, and that the return of service of the notice was not proper. However, we herein adopt the rationale of Eighth District Court of Appeals, which addressed an analogous argument in *Village of Highland Hills v. City of Cleveland* (November 2, 1995), Cuyahoga App. No. 68064, unreported:

> Since the trial court is able to cure any defect in the appropriation process, including notice to a party in interest, through the application of R.C. 163.12, thereby protecting the due process rights of the landowner, it cannot be said that non-compliance with the notice provision contained

> in R.C. 719.05 divests the trial court of subject matter jurisdiction.
>
> *Id.* at 3.

The notice defects raised by appellants before the trial court were addressed and cured during the proceedings *sub judice*. Zellwegers' First Assignment of Error is therefore overruled.

IV.

As Zellwegers' Fourth Assignment of Error (Dunlaps' Third Assignment of Error) is dispositive of many of the remaining issues on appeal, we will address this argument out of sequence. Appellants therein contend that the city's acquisition of the properties in question, via appropriation, was unconstitutional given the prior sale of its interest in the hospital. We disagree.

R.C. 719.01, which directs appropriation of property by municipalities, states in part as follows:

> Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:
>
> * * *
>
> (E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;
>
> * * *

Appendix A

The statutory authority of a municipality to acquire property against the consent of the owner by eminent domain is limited and pertinent statutes are to be strictly construed. *McMechan v. Board of Education of Richland Twp., Belmont County* (1952), 157 Ohio St. 241. The Ohio and United States Constitutions both require that the power of eminent domain be exercised for a public purpose. Section 19, Article I, Ohio Constitution; Fifth and Fourteenth Amendments to the United States Constitution; see, also, *City of Huron v. Hanson*, (July 28, 2000), Erie App. No. E-99-060, unreported.

Courts have frequently wrestled with the definitions of "public use" and "public purpose". Decades ago, the Ohio Supreme Court aptly noted: "No exact definition of the term 'public use' has been agreed upon by the authorities, and of course there is difficulty in formulating an accurate definition that would be comprehensive and satisfactory." *Pontiac Imp. Co. v. Board of Com'rs of Cleveland Metropolitan Park Dist.* (1922), 104 Ohio St. 447, 460. However, the Supreme Court in Pontiac went on to recite Professor Nichols' comprehensive definition of "public use," which included the following: "[T]o serve the public with some necessity or convenience of life which is required by the public as such and which cannot by readily furnished without the aid of some governmental power, whether or not the taking is made by a public body, provided the public may enjoy such service as of right." *Id.* R.C. 163.09(B) provides that the property owner bears the burden of proving that the legislative body abused its discretion in determining that an appropriation is necessary. An abuse of discretion is shown by evidence that the agency's decision to appropriate was unreasonable, arbitrary, or unconscionable. *City of Huron, supra, citing Ohio Power Co. v. Diller* (1969), 18 Ohio App.2d 167, 176.

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Appellants urge us to follow *Eighth & Walnut Corp. v. Public Library of Cincinnati* (1977), 57 Ohio App.2d 137, which refused to allow the City of Cincinnati to appropriate land for a county, as opposed to a city-operated, library under the aegis of R.C. 719.01(H):

> To interpolate this authority into R. C. 719.01(H) would be to find that the defendant city could also appropriate property for transfer to and for the benefit of, say, Harvard University, or any other such private institution, under the grant of appropriation powers "(F)or * * * university sites, and grounds therefor * * *." This obviously was not intended by R. C. 719.01, which enumerates fifteen categories of purposes for which the power of eminent domain may be exercised, all of which involve traditional areas of municipal authority (E. g., improving streets and canals, establishing parks, playgrounds, public offices, prisons, hospitals levees, bridges, sewers, etc.) exercised by the municipality directly for the benefit of its citizens.

Id. at 139-140.

However, we are more inclined to follow the rationale of *Berman v. Parker* (1954), 348 U.S. 26, addressing a congressional redevelopment plan for areas of the nation's capital. The United States Supreme Court therein stated:

> Once the object is within the authority of Congress, the right to realize it through the

> exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [Citations omitted]. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.
>
> *Id.* at 33.

Thus, upon review of the record, we find no merit in appellant's assertion that the city's utilization of eminent domain, through the conduit of ACHA, to improve hospital facilities for the good of the Alliance public was an unconstitutional act. It is undisputed that this matter involves a city of well over twenty thousand of residents, host to an institution of higher learning and numerous industries, yet served by a sole acute care hospital facility. Several courts have made reference to the view that "* * * where a private hospital is open to the public, uses federal funds and has a virtual monopoly in the area in which it operates, it is still non-governmental, but acts in a fiduciary capacity for the public." *Gotsis v. Lorain Community Hospital* (1974), 46 Ohio App.2d 8, 18, citing *Davidson v. Youngstown Hosp. Assn.* (1969), 19 Ohio App.2d 246, 250 N.E.2d 892; *Greisman v. Newcomb Hospital* (1963), 40 N.J. 389, 192

A.2d 817; and *Woodard v. Porter Hospital* (1966), 125 Vt. 419, 217 A.2d 37. We thus find no merit in appellants' claim that City Council's conclusion to allow for expansion of a vital medical institution, serving the public's needs, exceeded constitutional bounds under these facts.

The Assignment of Error is overruled.

II, III, V.

In their Second, Third, and Fifth Assignments of Error, (Dunlaps' First, Second, and Fourth), appellants raise various issues pertaining to the existence or nonexistence of urban blight or slum areas. However, based on our holding above, we find that appropriation, as a means of promoting the public purpose of maintaining a hospital in the city, was valid under these circumstances, even in the absence of blight. Any further discussion is therefore merely academic.

The Second, Third, and Fifth Assignments of Error are overruled as moot.

VI.

In their Sixth Assignment of Error, (Dunlaps' Fifth), appellants challenge the trial court's finding pertaining to the city's reversionary interest in the properties in question. However, based on our reliance on *Berman v. Parker*, *supra*, above, the hospital land appropriation via ACHA was found not constitutionally infirm, and said appropriation would not be impacted by the validity or invalidity any reverter interest.

The Sixth Assignment of Error is overruled as moot.

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VII.

In their Seventh Assignment of Error, appellants argue that the trial judge erred in refusing to recuse himself pursuant to appellant's request for disqualification. We disagree.

R.C. 2101.39 directs the method of seeking disqualification of a probate judge on the basis of prejudice:

> If a probate judge allegedly has a bias or prejudice for or against a party or a party's counsel in a proceeding pending before the judge, allegedly otherwise is interested in a proceeding pending before the judge, or allegedly is disqualified to preside in the proceeding and if the bias, prejudice, interest, or disqualification does not permit or require certification of the proceeding to the court of common pleas as provided by section 2101.38 of the Revised Code, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court. The affidavit of disqualification shall be filed and decided in accordance with divisions (B) to (E) of section 2701.03 of the Revised Code, and, upon the filing of the affidavit, the provisions of those divisions apply to the affidavit, the proceeding, the judge, and the parties to the proceeding.

The record reveals no indication that appellants filed any affidavit per the above statute. Instead, appellants jointly filed an unsworn motion to request a hearing on "qualification of

judge to preside in trial." Moreover, in cases in the courts of common pleas, the Chief Justice of the Supreme Court of Ohio has exclusive jurisdiction to determine a claim that a trial judge is biased or prejudiced. *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11. Common pleas litigants in this type of situation must bring any challenge to the trial judge's objectivity by way of the procedure set forth in R.C. 2701.03. See *In re Baby Boy Eddy* (Dec. 6, 1999), Fairfield App. No. 99CA22, unreported, citing *In re Miller* (July 16, 1999), Montgomery App. No. 17592, unreported, at 2. Since only the Chief Justice or his designee may hear a disqualification matter, a court of appeals is without authority to void the judgment of a trial court because of bias or prejudice of the judge. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-42. We find no reason why this rationale would not apply to a probate court proceeding.

Therefore, we are without jurisdiction to decide the merits of appellant's Seventh Assignment of Error. Appellant's Seventh Assignment of Error is overruled.

VI (Dunlap)

In their Sixth Assignment of Error, Appellants Dunlaps argue that the trial court erred in deducting a "commission" from the monies distributed to them. We disagree.

Appellant essentially argues that R.C. 2303.20(V), which permits assessment of certain fees by the county clerk of courts, would not apply to a probate judge acting in the capacity of clerk of the probate court under R.C. 2101.11(A)(1). However, R.C. 2101.18 allows the following:

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> For services for which compensation is not provided but subject to section 2101.27 of the Revised Code insofar as the probate judge solemnizes marriages, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services.

We therefore find said commission to be within the discretion allowed the trial judge pursuant to statutory authority.

Dunlap's Sixth Assignment of Error is overruled.

For the reasons stated in the foregoing opinion, the judgments of the Court of Common Pleas, Probate Division, Stark County, Ohio, are hereby affirmed.

By: Wise, J.

Gwin, P. J., concurs.

Hoffman, J., concurs separately.

s/ John W. Wise
s/ W. Scott Gwin
JUDGES

Appendix A

Hoffman, J.

I fully concur in the majority's analysis and disposition of appellants' assignments of error. I write separately only to question whether this Court has jurisdiction to review the majority of arguments raised by appellants.[1]

Reading R.C. 163.19 literally leads me to conclude a landowner loses his ability to appeal the right to take and use the property appropriated after the appropriating agency pays or deposits the amount of the award assessed (plus adequate security if required by the court). Such a literal reading appears to conflict with R.C. 163.09(B), which states, if the court finds in favor of the appropriating agency on any matter relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation, the court's order is not a final appealable order for purposes of appeal until assessment of compensation due for the appropriation.

This creates a catch-22 for appellants. Appellants could not appeal the trial court's ruling on the necessity of the appropriation until after the jury determined the amount of compensation. However, once the amount of compensation found owed was paid or deposited with the court, appellants no longer have the right to challenge the appellee's right to take and use the property on appeal. I suggest the best way to resolve this catch-22 would be for the legislature to amend R.C. 163.09 to specify a decision in favor of the agency on

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1. Assignment of Error VI by appellants Dunlap is clearly subject to our review.

the preliminary issue of the agency's right to or necessitation for appropriation is a final appealable order. In the absence any express statutory directive, such determination would ordinarily constitute a final appealable order under R.C. 2505.02(B)(2) and (B)(4).

Further clouding the question of review by this Court is the effect of the distribution of the award to appellants pursuant to R.C. 163.18. The majority concludes the distribution does not render appellant's arguments concerning the right to and necessity for appropriation moot. I am not convinced it does not do so.

After trial, appellants applied to the trial court for distribution of the funds deposited by appellee in satisfaction of the jury's verdict. Appellants neither requested a suspension of execution of the order in the trial court pursuant to R.C. 163.19, nor a stay pending appeal in this Court. In the interim, appellee has taken possession of the property and demolished structures thereon, while appellants have had use of the funds deposited into the court.

Counsel for appellants asserted if appellants are successful on appeal, they will refund the amount they received in satisfaction of the jury's verdict. Such presumes the money is still readily available. Had this Court reversed the trial court's decision regarding the necessity of appellee's appropriation and appellants then failed to return the money they received, appellee would be forced to commence legal action to recover the money. It is not unlikely the amount to be refunded would be disputed, given appellants' anticipated claim to a setoff because of damages caused by appellee to the premises.

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The majority relies upon *Kraemer v. Board of Ed. of Cincinnati* (1917), 8 Ohio App. 428, in support of its position this issue is not moot. Upon my review of *Kraemer*, I find it distinguishable. The issue on appeal in *Kraemer* was the proper amount of money to be paid to the landowner, not the right to appropriate. The *Kraemer* court was concerned with the inequity of allowing the board of education to take possession of the land upon entry of the judgment without giving the landowner any interest upon the money or its investment for his benefit pending appeal. The simple solution to this inequity would be to escrow the funds paid to satisfy the judgment pending resolution of the appeal in an interest bearing account. Furthermore, unlike *Kraemer*, neither party herein gave any security or bond to insure proper final adjustment after resolution of the appeal.

In the other case cited by the majority on this issue, *Wagner v. Railway Co.* (1882), 38 Ohio St.32, the landowner therein, like *Kraemer*, did not challenge the right to appropriate, but rather the amount of compensation to be paid. Both cases predate the present version of Ohio's Uniform Eminent Domain law. The application of these cases should be limited to where only the amount of compensation is being appealed. I suggest the better approach would be to find the landowner's acceptance of the amount deposited by the appropriating agency renders any challenge to the agency's right to or necessity for appropriation moot.

s/ William B. Hoffman
JUDGE WILLIAM B. HOFFMAN

Appendix A

IN THE COURT OF APPEALS
FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CASE NOS. 2000CA00093 and 2000CA00094

THE CITY OF ALLIANCE,

Plaintiff-Appellee

– vs –

SHEA and ALEIDA H. ZELLWEGER;
RONALD and JANET DUNLAP,

Defendants-Appellants

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgments of the Court of Common Pleas, Probate Division, Stark County, Ohio, are affirmed.

s/ John W. Wise
s/ W. Scott Gwin
s/ William B. Hoffman
JUDGES

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE PROBATE COURT OF STARK COUNTY, OHIO DATED AND FILED MAY 31, 2000

PROBATE COURT OF STARK COUNTY, OHIO

CASE NO. 173863

IN RE:

CITY OF ALLIANCE,

PLAINTIFF

VS.

SHEA ZELLWEGER ET AL.,

DEFENDANTS

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came on for hearing before the Court on December 10, 13, 14, and 16, 1999, on the issue of the necessity for the appropriations. Appearances were by Thomas W. Connors and Andrew L. Zumbar in Case Numbers 173862, 173863 and 173864, attorneys for the plaintiff, and Andrew L. Zumbar in Case Number 173970, attorney for the plaintiff, and Richard C. Ross and Allan L. Krash, attorneys for the landowners in all four cases, two of which are the subject of this procedure. It was agreed by all

legal counsel that all of the above captioned cases would be heard together on the issue of the necessity for the appropriations. On December 29, 1999, Attorney Krash filed a request for findings of fact and conclusions of law, but this Court found the request to be untimely pursuant to R.C. 163.09. Subsequently, Attorney Krash on March 31, 2000, filed a new request for findings of fact and conclusions of law after a jury verdict on February 23, 2000 awarded the defendants, Shea and Aleida Zellweger, the sum of $125,000.00. On April 26, 2000, this Court noticed counsel for the respective parties to file their proposed findings on or before May 17, 2000. On May 17, 2000, attorneys for the defendants filed their proposed findings and on May 19, 2000, attorney for the plaintiff filed his proposed findings. The Court finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The plaintiff, the City of Alliance, Ohio, is an Ohio Municipal Corporation.

2. The defendants, Shea and Aleida Zellweger, are the owners of Part of Out Lot 252 and Part of Out Lot 249 in the City of Alliance, Stark County, Ohio.

3. Ordinance No. 119-98S (Plaintiff's Exhibit 10) was enacted by the council of the City of Alliance on October 26, 1998. This ordinance together with its exhibits creates the blue print for the procedures to follow. This ordinance designates the Greater Alliance Development Corporation (GADC), a community improvement corporation, to act as

agent for the City of Alliance and to enter into a purchase agreement with Alliance Citizens Health Association, Inc., for the sale of the land, buildings, fixtures, equipment, personal property owned by the City of Alliance and referred to as Alliance Community Hospital. The ordinance says in part,

> "Whereas, in order to accomplish the goals of creating and/or preserving jobs and improving economic welfare, the City has been requested to sell the land, buildings and equipment known as the hospital and which will also require the City to exercise eminent domain to acquire sufficient land for the project."

Exhibit B attached to this ordinance sets forth specific restrictions on the sale, to wit, the sale price shall not be less than $4,177,000.00; the deed of transfer shall contain a reversionary interest for the City of Alliance if the hospital shall fail to operate an acute care hospital within the corporate limits of the City of Alliance or if the hospital would fail to expend $25,000,000.00 for construction of a health care facility within 3 years from the date title is conveyed by the City. There are definitions of what constitutes a health care facility and detailed language as to prospective mergers and to the creation of a non-profit charitable foundation to be formed and funded with the money that would be paid if the hospital would be sold. The most significant language in Exhibit B that relates to the matter before this Court is in Paragraph 5 which conditions the sale of the hospital by the City of Alliance on the City of Alliance's successful eminent domain proceedings having been convened for

> "acquisition of related properties necessary for the operation and management of a hospital."

4. Resolution No. 15-99 (Defendant's Exhibit F and Plaintiff's Exhibit 8) was adopted by the Council of the City of Alliance on February 1, 1999. This resolution declares the necessity and intent to appropriate the real estate described in Exhibit "A", which lists 19 owners by name, address and brief legal description. The resolution states that the enumerated real estate is needed

> "for purposes of urban renewal and redevelopment, to create jobs and employment opportunities and to improve the economic welfare of the people, and specifically for the construction of a new and expanded health care facility in accordance with the Health Care Facility Development Plan which was adopted by Ordinance No. 119-98 Substitute."

The defendants herein are listed on Exhibit "A".

5. Resolution No. 21-99 (Defendant's Exhibit B) was adopted by the Council of the City of Alliance on February 16, 1999. The caption of this resolution is descriptive of its contents, to wit;

> "A RESOLUTION APPROVING THE ACQUISITION AND DEVELOPMENT PLAN BETWEEN THE CITY OF ALLIANCE AND THE ALLIANCE CITIZENS HEALTH ASSOCIATION, INC., AND DECLARING AN EMERGENCY."

Appendix B

This resolution refers to Ordinance No. 119-98S and it also incorporates by reference an attached redevelopment agreement between the City of Alliance and Alliance Citizens Health Association, which in great detail sets forth the plans by the City of Alliance and Alliance Citizens Hospital Association, Inc., for the acquisition, disposition and redevelopment of the geographical area in the City of Alliance bounded on the North by College Street, on the East by Arch Avenue, on the South by State Street and on the West by Union Avenues.

6. The City agreed to acquire by negotiation, or eminent domain any property in the plan area which Alliance Citizens Health Association, Inc. could not acquire by negotiations. Any property so obtained by the City would be purchased by the Redeveloper from the City for the negotiated price or for the sum awarded by a jury through eminent domain, plus stipulated expenses such as title reports and legal counsel costs.

7. Ordinance No. 118-99 (Plaintiff's Exhibit 9 and Defendant's Exhibit H) was enacted by the Council of the City of Alliance on August 16, 1999. This ordinance recites that the City of Alliance has been unsuccessful in obtaining certain real estate referred to in Resolution No. 15-99 and is the authorization to proceed to acquire by appropriation the real property of the defendants herein and other real property all of which was previously identified in Resolution No. 15-99. The language of this ordinance restates in part what has been enunciated in Resolution No 15-99 and Ordinance No. 119-98S and it specifically provides in Section 1 that the City is directed to proceed to obtain the real estate

described in Exhibit "A", which includes all of defendants' real property and other real property, for purposes of urban renewal and redevelopment, to create and preserve jobs,

> "and specifically for the construction of a new and expanded hospital . . .".

8. Resolution No. 15-99, (Plaintiff's Exhibit 8 and Defendant's Exhibit F) contains the information required by R.C. § 719.04. R.C. § 163-05 sets forth the requirements for the contents of a petition for appropriation. R.C. § 163.08 provides to the landowner direction on what the landowner's answer may contain and if the necessity of the appropriation is raised as a defense that it must be specifically denied in the answer. The defendants in the within case have specifically denied the necessity of the appropriation in their amended answer.

9. The defendants have raised in their responsive pleadings the issue of whether the City of Alliance has complied with the statutory mandates of R.C. 719.05. Specifically, they question whether timely notice was given by the proper person to the landowner of the passage of the resolution declaring intent to appropriate. The statute says:

> ". . . (T)he mayor of the municipal corporation shall, *immediately* upon the passage of the resolution . . . *cause* written notice to be given to the owner . . ." (Emphasis added)

In the cases at bar the resolution (Resolution No. 15-99) in question was adopted on February 1, 1999 and notice was

given by the Law Director of the City of Alliance by certified mail sent on February 24, 1999. The resolution provides in Section 2 that the mayor is directed and authorized to cause notice of the adoption of the resolution be given to the owners of the real estate identified on Exhibit "A" which is incorporated by reference in the resolution.

Defendant's Exhibit L is a letter from Andrew L. Zumbar, Law Director, to Shea and Aleida Zellweger, dated February 24, 1999, advising them of the passage of the resolution in question. The letter recites that a copy of the resolution was enclosed. The letter then addresses the matter of the appraisal of the owner's property by an appraiser for the City. Law Director Zumbar testified that he sent a similar letter to each of the defendants before the Court in this matter on the same date and that the certified mail receipt (the green card) was returned to him signed by the addressee and remains in his possession as Law Director of the City.

10. Ordinance No. 118-99 to proceed was not enacted until August 16, 1999 and the Petition for Appropriation was not filed until August 30, 1999. The landowners had over six (6) months actual notice of the eminent domain proceedings before they were filed.

11. According to the testimony, as early as of October, 1997, the Alliance Citizens Hospital Association, Inc., or one of its related entities, such as, Alliance Community Hospital or Alliance Citizens Health Association, Inc., who will collectively be referred to as "Hospital", was in the process of developing a master plan or strategic plan for the future of the Hospital. An architectural firm, Kaplan,

McLaughlan Diaz (KMD) was hired by the Hospital to assist in this process.

12. On October 1, 1997 KMD issued a "Strategic Facility Alternatives" report. (Plaintiff's Exhibit 1). This was followed on January 27, 1998 by the Campus Master Plan Study. (Plaintiff's Exhibit 2).

Each of the these two studies had several options, such as, buying vacant land and building new health care facilities, renovating the existing facility, building a new addition on the existing site, or having split facilities with some on the current site and some on a new site.

13. On June 4, 1998, KMD issued a report entitled "Feasibility of Designing and Building a Replacement Hospital on this Campus". (Plaintiff's Exhibit 3) "This Campus" became to be known as the current site occupied by the hospital and its ancillary facilities.

14. The testimony of council persons was that there were significant community dynamics that caused the Hospital to eliminate all off site options and negotiate with the City of Alliance to purchase the existing hospital facilities from it and to contract with the City to acquire the needed additional lands surrounding the Hospital. See Ordinance No. 119-98S enacted October 26, 1998.

15. Defendant's Exhibit I, dated July 6, 1998 was a memo from Alliance Citizens Health Association to the City of Alliance and Alliance Board of Education outlining a proposal to each for acquisition of lands. One Alliance City

Council witness was quite adamant that if the Hospital abandoned the current campus that blight would occur almost immediately and that existing blighted areas to the North and East would creep toward the Hospital.

16. Several members of the Council of the City of Alliance testified that they wanted the hospital to remain on its current site or campus and that they supported the sale of the current hospital to the Hospital in consideration of the agreed monetary price of $4,177,000.00 subject to the reverter provisions required by the City.

The witnesses further supported the request of the Hospital that additional lands surrounding the hospital be acquired by eminent domain.

The testimony was consistent that if the Hospital moved from the present campus it would have a negative impact on the surrounding area and loss of income tax revenue to the City if a new hospital was constructed outside the corporate boundaries of the City. There was no testimony in contradiction or opposition to these opinions.

17. Counsel for the landowners in their cross examination of city officials asked them if they considered the area in question to be a blighted or slum area subject to urban renewal? Each of the officials answered in the negative and agreed with defendant's counsel that the area in question did not contain any condemned structures that needed to be razed.

18. In Resolution No. 21-99 the term "private redevelopment" was used and in Ordinance 119-98S the

phase consistent throughout was "general welfare", "economic welfare", and to maintain an acute general health care hospital on the site.

19. The City of Alliance has one (1) acute care hospital. This hospital was located on lands owned by the City until March 26, 1999. On that date the City of Alliance through its agent, Greater Alliance Development Corporation, conveyed by a General Warranty Deed (Defendant's Exhibit D) and by a Bill of Sale (Defendant's Exhibit E) to Alliance Citizens Health Association, Inc., all of its interest in the Hospital. As a part of Plaintiff's Exhibit 10 is an agreement between the City of Alliance and the Greater Alliance Development Corporation (GADC), dated March 26, 1999. This agreement refers to Ordinance No. 119-98S and authorized the GADC to execute and deliver the necessary documents to sell the City's interest in the Hospital and to deliver the proceeds to the City Auditor. Defendant's Exhibit K shows that on April 1, 1999 the Auditor received $4,176,835.00 for the sale of the hospital property.

The deed contained reversionary conditions which would be triggered to wit;

A. If Alliance Citizens Health Association, Inc., or Alliance Community Hospital, Inc., shall fail to operate an acute care hospital within the corporate limits of the City of Alliance, Ohio, which admits patients without regard to face, creed or color upon the above-described premises and/or any adjoining land.

B. If Alliance Citizens Health Association, Inc., Alliance Community Hospital, Inc., or a joint venture between Alliance Citizens Health Association, Inc., and the Aultman Health Foundation in which Alliance Citizens Health Association, Inc., or Alliance Community Hospital, Inc., hold or maintain a minimum interest of 50%, shall fail to commence the construction and diligently continue the construction (subject to labor strikes, acts of God, or other *force majeure* causes) of not less than a $25 million health care facility hereinafter defined but specifically including a hospital facility, wellness center and nursing home), within three (3) years from the date of the recordation of the within general warranty deed with said health care facility constructed on the above-descibed premises or adjoining land.

CONCLUSIONS OF LAW

1. Plaintiff regards it authority to bring this action as being Article XVIII, Sections 3 and 10 of the Ohio Constitution and Ohio Revised Code Section 719.01 et seq., and subject to the procedures set forth in Chapter 163 of the Revised Code of Ohio. "Et seq" is defined by *Black's Law Dictionary, Fourth Edition*, to mean, "and the following". This Court considers the use of "719.01 et seq" to include all applicable sections of Chapter 719 of the Revised Code of Ohio.

Appendix B

2. Article 1, Section 19 of the Constitution of Ohio provides:

> "Private property shall ever be held inviolate but subservient to the public welfare . . . where private property shall be taken for public use, a compensation therefor shall be first be made in money or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

3. Article XVIII, Section 10 provides a municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Article XVIII, Section 3 provides municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

4. Revised Code Section 719.01 states:

> "Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits: (E) for hospitals, pesthouses, reformatories, crematories, and cemeteries."

Revised Code Section 719.01 further states that the powers conferred upon municipal corporations shall be

exercised pursuant to Sections 163.01 to 163.22 of the Revised Code.

5. Revised Code Section 719.04 states that wherever a municipal corporation deems it necessary to appropriate property it shall . . .

> ". . . pass a resolution declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land and the estate or interest therein desired to be appropriated."

6. Resolution No. 15-99, (Plaintiff's Exhibit 8 and Defendant's Exhibit F) contains the information required by R.C. Section 719.04. R.C. Section 163.05 sets forth the requirements for the contents of a petition for appropriation, and this Court finds the petition at bar to be in compliance with this code section.

7. The Court finds that the plaintiff has complied with the statutory requirements of R.C. 719.05. There is no question in this Court's mind that when a person is given authority to "cause" something to be done that the person charged with the responsibility may have the ministerial act performed by someone else. In the case at bar the Law Director of the City of Alliance assumed the responsibility. His actions are set forth at Item 9 of Findings of Fact. There is no statutory requirement that the designated person be designated or appointed in writing. Suffice to say the Law Director gave timely notice to the defendant landowners. Does the mailing date of February 24, 1999 comply with

the word "immediately" in the statute? This Court's response is "yes" when you consider that after a resolution or ordinance is adopted it is required to be published for two (2) consecutive weeks thereafter. Resolution No. 15-99 was published in the *Alliance Review* on February 17 and 24, 1999. The purpose of the written notice is to afford the landowner an opportunity to consider his or her options as to issues of appraisal or non-appraisal and relocation.

8. In The State, Ex Rel, Gordon, City Atty., v. Rhodes, Mayor et al (1951), 156 OS 81 at 97, the Supreme Court of Ohio stated:

> "It is the function of the legislative body of the city to determine what improvements and expenditures are necessary for the public welfare of the city and to determine what constitutes a public municipal purpose. A determination so made by the legislative body will not be rejected or reversed by the Court unless manifestly arbitrary or unreasonable."

9. In another Supreme Court of Ohio case, The State, Ex Rel, Bruestle, City Solicitor, v. Rich, Mayor, et al., (1953) 159 OS 13, the court stated in the syllabus:

> "Under Section 19 of Article I of the Ohio Constitution property taken for "public welfare" is regarded as property "taken for public use". Property may be taken for "the public welfare" or "for public use" as those words are used in Section 19 of Article I of the Ohio Constitution,

even though it is contemplated that there will at some future time be no use or right of use of the property taken on the part of the public or some limited portion thereof."

The Court went on to further state at page 27:

"While the power of eminent domain may not be exercised merely or primarily to take private property for private purposes, there is no constitutional provision which limits "the exercise of that power to a taking which will be exclusively for "the public welfare" or for public uses or for public purposes. If, therefore, the primary purpose for the exercise of the power is to acquire the property for "the public welfare" within the meaning of Section 19 of Article 1 of the Constitution, the power may be exercised even where there may be an incidental nonpublic use of the property or benefit from its taking."

10. This Court acknowledges the fact that the Bruestle case originated under an urban redevelopment project and although there is no question, that the defendants' property or the general area subject to the eminent domain proceedings by the City of Alliance for the hospital project is not a blighted or slum area, it is clear from the testimony by city officials that if the Hospital abandoned its current site it would have a negative impact on the adjacent areas as to value.

11. In another important case decided by the United States Supreme Court in 1954, the Court in a unanimous

decision found an urban redevelopment case (where the appellants were arguing that their commercial property may not be taken in a residential redevelopment project) that private property may be taken for public use if just compensation is paid and that once it has been determined by the legislative authority that the exercise of eminent domain is for a public purpose, the amount and character of the land to be taken and needed rests in the discretion of the legislative branch of government. The Court stated at page 32:

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, . . ." "Public safety, public health, mortality, peace and quiet, law and order, these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Samuel Berman et al., v. Andrew Parker, (1954) 348 US 26.

12. In an urban renewal or urban redevelopment project the appropriating authority is authorized to transfer the assembled lands for streets, utilities, public housing, recreational facilities and schools, to name a few public uses, and to lease or sell lands to redevelopment companies for private for profit development.

13. The utilization of defendants' land is less onerous than that which would be permitted in an ordinary

redevelopment project because the City of Alliance is guaranteed by contract that the lands appropriated will only be used for Hospital purposes under penalty of reverter to the City of Alliance. The City of Alliance by this appropriation proceeding is also insuring that its citizens will have a modern acute health care facility within the next three years.

Once there has been a determination that the exercise of eminent domain is for a public purpose, as Council of the City of Alliance has made, the amount and character of land to be taken and the need for a particular property rests in the discretion of the legislative branch of government.

14. In Snyder v. Board of Commissioners of Cleveland Metropolitan Park District (1932), 125 OS 336, the Supreme Court of Ohio considered the landowner's position that unless the park district had specific plans for the lands being appropriated the petition must not be granted. The Court found that the Resolution declaring the necessity of appropriating the property was valid even though no specific plan or current use was delineated. The Court said at page 340:

> "The action of the park board must be considered in the light of the responsibility resting upon it to *provide not only for present needs, but for the future*, (Emphasis added).

15. Although the phrases "urban renewal" and "urban redevelopment" were used in Resolution No. 15-99 and Ordinance No. 118-99, they appear to be used in their plain

language connotation and not for state or federal funding and also not as a basis for renovation of a blighted area.

In Resolution No. 21-99 the term "private redevelopment" was used and in Ordinance 119-98S the phase consistent throughout was "general welfare", "economic welfare", and to maintain an acute general health care hospital on the site.

16. The Council of the City of Alliance made an informed decision to initiate eminent domain proceedings against the defendants and others to assure the citizens of Alliance and its environs that it would have a community acute care hospital on its present campus. The council also was sufficiently concerned about the public health and public safety of its citizens that it required very stringent conditions on its sale of the current hospital to Alliance Citizens Health Association, Inc., coupled with reverter provisions that would insure significant capital investment in the current site over the next three years.

17. The City of Alliance has demonstrated that necessity for this appropriation exists and that defendants' real property will be utilized in the redevelopment and expansion of the hospital for the public health of the citizens of the City of Alliance and its environs.

s/ R.R. Denny Clunk
HON. R. R. DENNY CLUNK
PROBATE JUDGE

Dated: May 31, 2000

APPENDIX C — ENTRY OF THE SUPREME COURT OF OHIO DECLINING JURISDICTION TO HEAR CASE AND DISMISSING APPEAL DATED AND FILED JUNE 27, 2001

THE SUPREME COURT OF OHIO

Case No. 01-786

The City of Alliance,

Appellee,

v.

Shea and Aleida H. Zellweger,

Appellants;

Ronald and Janet Dunlap.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Allan L. Krash.

(Stark County Court of Appeals; No. 2000CA00093)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX D — CONSTITUTIONAL PROVISIONS AND CODE INVOLVED

U.S. Const., Amend. V

Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. XIV

Section 1. Citizens of the United States.

All persons born or naturalized in the Untied States, and subject to the jurisdiction thereof, are citizens of the Untied States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

Sec. 2. Representatives — Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the Untied States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Appendix D

Sec. 4. Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay and debt or obligation incurred in aid of insurrection or rebellion against the Untied States, or any claim for the loss of emancipation of any slaves, but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Const., Art. I, § 19

OHIO CONST. I § 19 Eminent domain

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such

compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851 constitutional convention, adopted eff. 9-1-1851)

Ohio Const., Art. XVIII, § 10

OHIO CONST. XVIII § 10 Acquiring property exceeding public needs

A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

(1912 constitutional convention, adopted eff. 11-15-12)

Ohio Rev. Code § 719.01

719.01 Appropriation of property by municipal corporations

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:

Appendix D

(A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of such property, and for obtaining material for the improvement of streets and other public places;

(B) For parks, park entrances, boulevards, market places, and children's playgrounds;

(C) For public halls and offices, and for all buildings and structures required for the use of any municipal department;

(D) For prisons, workhouses, houses of refuge and correction, and farm schools;

(E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;

(F) For levees, wharves, and landings;

(G) For bridges, aqueducts, viaducts, and approaches thereto;

(H) For libraries, university sites, and grounds therefor;

Appendix D

(I) For constructing, opening, excavating, improving, or extending any canal or watercourse, located in whole or in part within the limits of the municipal corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvement;

(J) For sewers, drains, ditches, public urinals, bathhouses, water closets, and sewage and garbage disposal plants and farms;

(K) For natural and artificial gas, electric lighting, heating, and power plants, and for supplying the product thereof;

(L) For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around, and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds as to the future use of such lands, so as to protect public buildings, and their environs, and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;

(M) For providing a water supply for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, and water works, and

for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without its limits; and for such purpose and[1] such municipal corporation may appropriate, in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code, any property or right or interest therein, previously acquired by any private corporation for any purpose by appropriation proceedings or otherwise, and either party to such appropriation proceedings shall have the same right to change of venue as is given in the trial of civil actions;

(N) For the construction or operation of street, interurban, suburban, or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges, and other appurtenances for the transportation of persons, packages, express matter, freight, and other matter, to, from, into, or through the municipal corporation; and for such purpose any municipal corporation may appropriate any property within or without its corporate limits; and any municipal corporation may appropriate any property, right or interest therein previously acquired by any private or public utility corporation for any

1. Prior and current versions differ, although no amendment to this language was indicated in 131 S 94; "and" appeared as "any" in 1953 H1.

purpose by appropriate proceedings, as well as the right to cross on, over, or under any street, avenue, alley, way, or public place or part thereof of any other municipal corporation, township, or county;

(O) For establishing airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation for aircraft and transportation terminals, with power to impose restrictions or any part thereof and leasing such part thereof as is desired for purposes associated with or incident to such airports, landing fields, or other air navigation facilities and transportation terminals, including the right to appropriate a right of way for highways, electric, steam, and interurban railroads leading from such airport or landing field to the main highways or the main line of such steam, electric, or interurban railroads, as are desired; all of which are hereby declared to be public purposes.

Division (O) of this section does not authorize a municipal corporation to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere, at the sole cost of the municipal corporation.

Appendix D

The powers conferred upon municipal corporations by this section shall be exercised for the purposes and in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code.

"Airport," "landing field," and "air navigation facility," as defined in section 4561.01 of the Revised Code, apply to division (O) of this section.

(131 v S 94, eff. 1-1-66; 1953 H 1;GC 3677)

Supreme Court, U.S.
FILED
OCT 25 200
CLERK

No. 01-522

In The

Supreme Court of the United States

SHEA ZELLWEGER and ALEIDA H. ZELLWEGER,

Petitioners,

vs.

THE CITY OF ALLIANCE, OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Fifth District Court Of Appeals, State Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the City of Alliance's exercise of eminent domain power over petitioners' property is rationally related to a conceivable public purpose.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15, respondent, the City of Alliance (the "City"), hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. Procedural History

Respondent, the City of Alliance, filed a petition to appropriate petitioners' property on August 30, 1999. Petitioners filed an answer on November 8, 1999 denying that the appropriation served a public purpose and the trial court held an evidentiary hearing on this question on December 10, 1999. On December 21, 1999, the trial court ruled that the City had not abused its discretion in determining that the appropriation served a public purpose.

A trial was held on the issue of compensation for petitioners' property on February 22, 2000. The jury entered a verdict in favor of petitioners in the amount of $125,000.00, and judgment was entered on that verdict on March 3, 2000. The judgment amount was subsequently paid to petitioners. Pet. App. p. 7a. The Ohio Court of Appeals affirmed the trial court's judgment on March 13, 2001. On June 27, 2001, the Ohio Supreme Court declined jurisdiction to hear the case, stating that it did not involve any substantial constitutional question.

Petitioners filed a petition for a writ of certiorari to the Ohio Court of Appeals with this Court on September 25, 2001.

B. Statement of the Facts

On February 1, 1999 and August 16, 1999, after an extended planning process, the Council of the City of Alliance ("Council") authorized eminent domain proceedings for certain parcels of real estate, including petitioners' property, in connection with the construction of new and expanded facilities for the Alliance Community Hospital (the "Hospital"). The Hospital is operated by the Alliance Citizens Health Association, Inc. ("ACHA") in facilities which until 1999 were leased from the City of Alliance (the "City"). The planning process commenced in August 1997, when the Hospital developed a strategic plan which included planning for new and expanded hospital facilities. The plan, developed in accordance with the recommendations of engineers and architects, contemplated a need for 20 or more acres if the project went forward on the present site of the Hospital, or 40 or more acres if it went forward on a new site.

In September 1997, Hospital management met with hospital architects from Kaplan McLaughlin Diaz (KMD) regarding alternatives for the project. KMD prepared a report entitled Strategic Facility Alternatives to assess the various options available. The report focused on three alternatives, one of which contemplated using the present site of the Hospital, and two of which contemplated using alternative sites. In early 1998, the Hospital informed the

public of the various alternatives which it was considering for the new project.

City of Alliance officials became closely involved with the planning process and concluded that the public welfare would best be served by the Hospital remaining in its present location. Councilman Michael Ogline was appointed to the Board of Hospital Commissioners and met with the Hospital and other interested parties on numerous occasions to review various hospital project proposals. Ogline concluded that keeping the Hospital at the present location, as opposed to alternative sites on the outskirts or outside of the City, benefited the public welfare for a number of reasons. One reason was the fact that the present location is centrally located and therefore provides convenient access from all areas of the City. Moving the Hospital to a site on the edge of the city would provide poor access for citizens on the other side of the City.

Another consideration was to prevent the development of a blighted area immediately adjacent to Mount Union College, with resulting negative consequences for that neighborhood, the college and the City as a whole. A blighted area presently exists just to the northeast of the Hospital's present location. If the Hospital moved, it would result in numerous related businesses also moving, and would leave the various hospital buildings and buildings of related businesses vacant. It was considered unlikely that appropriate alternative uses would be found for these buildings, which would become blighted, and would increase the likelihood of blight creeping from a present blighted area to the northeast into the area surrounding the Hospital.

A further consideration was that retention of the Hospital at its present location would provide an economic boost to an area which the City wanted to ensure remained a viable business location.

As a result of these various considerations, the City prevailed on the Hospital to pursue its expansion project at its present location. The Hospital, in conjunction with architects and engineers, considered numerous proposals regarding the property that would be needed for the various facilities that it was planning. These facilities included a new hospital building, a skilled nursing facility, a medical office building, an orthopedic and wellness center and a new power plant, as well as renovation of existing facilities. Councilman Ogline and other City officials met with Hospital officials and other interested parties extensively during this process. The architects advised the Hospital that 20 acres or more would be required for the project. After extensive consideration, properties sufficient to allow for the required area were identified and the plan was presented to Council. This plan included petitioners' property, which is the subject of this case.

On October 26, 1998, Council enacted Ordinance No. 119-98S which authorized the sale of the City's interest in the Hospital's facilities to ACHA for $4,177,000.00. Council designated the Greater Alliance Development Corporation ("GADC") to act as its agent in the transaction. The ordinance required that the deed of transfer contain a reversionary interest for the City if ACHA should fail to operate an acute care hospital within the corporate limits of the City or if ACHA failed to commence the construction of a $25,000,000 health care facility within three years

from the date title is conveyed by the City. On January 6, 1999, GADC entered into a sales agreement, conditioned on the City's successfully conducting eminent domain proceedings to acquire properties necessary for the hospital redevelopment project.

On February 1, 1999, Council adopted Resolution No. 15-99 which declared the necessity and intent to appropriate real estate adjacent to the Hospital, including petitioners' property, for purposes of urban renewal and redevelopment, to create and preserve jobs, and specifically for the construction of a new and expanded health care facility.

On February 16, 1999, Council adopted Resolution No. 21-99 which approved a redevelopment agreement between the City and ACHA. The redevelopment agreement provided in great detail for the development of a new hospital facility at the Hospital's present location and on land immediately adjacent thereto. The redevelopment agreement also provided that the City would acquire by eminent domain those additional properties needed for the new hospital facility. The redevelopment agreement was executed on March 4, 1999. The GADC, acting as the City's agent, then transferred the City's interest in the Hospital to ACHA on March 26, 1999, subject to the above-described reversionary interest.

On August 16, 1999, the Council enacted Ordinance No. 118-99 reciting that the City had been unsuccessful in obtaining certain real estate referred to in Resolution No. 15-99, including petitioners' property, and authorizing appropriation of such real estate, for purposes of urban renewal and redevelopment, to create and preserve jobs

and specifically for the construction of a new and expanded hospital.

C. The Trial Court's Decision

The trial court applied the rule that a municipal legislative body's determination as to what constitutes a public municipal purpose may not be reversed unless manifestly arbitrary or unreasonable. Pet. App. p. 36a, Conclusion of Law ¶8. The trial court held that the City of Alliance had demonstrated that the taking of petitioners' property served a public purpose in that it would be utilized in the redevelopment and expansion of a hospital for the public health of the citizens of Alliance and its environs. Pet. App. p. 40a, Conclusion of Law ¶17. The trial court noted that the City retained a reversionary interest in the event that the construction of new hospital facilities did not commence within a three year period. Pet. App. pp. 32a-33a, Finding ¶19 and p. 40a, Conclusion of Law ¶16.

D. The Court of Appeal's Decision

The Ohio Court of Appeals concluded that the Ohio and United States Constitutions both require that the power of eminent domain be exercised for a public purpose, and that a legislative body's determination to appropriate property could be reversed only upon a showing that it was unreasonable, arbitrary or unconscionable. Pet. App. p. 12a. The court of appeals found that there was no merit in petitioners' assertion that the City's utilization of eminent domain to improve hospital

facilities for the good of the Alliance public was unconstitutional. Pet. App. p. 14a. The court of appeals pointed to the undisputed fact that the matter involved a city of well over 20,000 residents, which was host to an institution of higher learning and numerous industries but was served by only one acute care hospital facility. Pet. App. p. 14a.

REASONS FOR DENYING THE WRIT

I. THE STATE COURT'S RESOLUTION OF THE FEDERAL QUESTION PRESENTED DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

A. The City's Compensated Taking Of Petitioners' Property For A Hospital Redevelopment Project Was Rationally Related To A Conceivable Public Purpose.

Review of the Ohio Court of Appeals' decision in this case is not merited because its resolution of the federal question presented does not conflict with relevant decisions of this Court. U.S. Supreme Court Rule 12(b). Petitioners dispute whether the City's taking of their property complies with the Public Use Clause of the Fifth Amendment, made applicable to the states under the Fourteenth Amendment. U.S. Const. Amendments V and XIV. The Fifth Amendment provides in pertinent part that: "No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amendment V.

The power of eminent domain has been exercised in this case pursuant to authority conferred upon Ohio municipalities by Sections 3 and 10 of Article XVIII of the Ohio Constitution. *State ex rel. Bruestle v. Rich,* 159 Ohio St.13, 32 (1953). The Ohio Supreme Court has held that "No provision of the Constitution of Ohio authorized the interference by general laws with the exercise of the power of eminent domain, to the extent that such power is granted to municipalities by Sections 3 and 10 of Article XVIII of that constitution." *State ex rel. Bruestle,* 159 Ohio St.13, paragraph nine of the syllabus.

Petitioners make no argument that just compensation has not been provided in the subject case. The only issue raised by petitioners is whether their property is being taken for a public use. The test set by this Court for whether a legislative public use determination is violative of the Fifth Amendment is stringent:

> " * * * Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.* In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (citation omitted) or the States legislating concerning local affairs. (Citations omitted.) This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. (Citations omitted.)

Berman v. Parker, 348 U.S. 26, 32 (1954). (Emphasis added.)

The very limited scope of judicial review of legislative public use determinations was emphasized repeatedly by this Court in *Hawaii Housing v. Midkiff*, 467 U.S. 229 (1984):

> "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. (Citation omitted.) The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925), which held that deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' * * * In short, *the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'* (Citation omitted.)"
>
> * * *
>
> * * * *But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be prescribed by the Public Use Clause.* (Citations omitted.)
>
> * * *
>
> * * * *When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings* – no less than debates over the wisdom of other

> kinds of socioeconomic legislation – *are not to be carried out in the federal courts.* * * * .

Hawaii Housing, 467 U.S. at 240-243. (Emphasis added.)

The Ohio Court of Appeals concluded that the City of Alliance's public use determination was based on public health considerations and therefore was not an abuse of discretion. Pet. App. pp. 12a, 15a. This ruling is consistent with this Court's statement that public health is a valid public purpose.

> "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. (Citations omitted.)"

Berman, 348 U.S. at 32.

Petitioners do not dispute that the purpose of the taking in this case was to support a hospital redevelopment project. Petitioners' argument essentially involves a claim that a properly stated rule of law has been misapplied. Such issues generally do not merit review by this Court. U.S. Supreme Court Rule 10. Moreover, the undisputed facts do not support an argument that the law was misapplied in this case.

B. The Transfer Of Property Taken By Eminent Domain To A Private Party Does Not Condemn The Taking As Having Only A Private Purpose.

The Ohio Court of Appeal's ruling, that a transfer of property taken by eminent domain to a private party does not preclude a public use determination, is also consistent with the relevant decisions of this Court. In this case, the City has entered an agreement whereby property taken by the City by eminent domain will be transferred to the Hospital for redevelopment. The *Berman* court has specifically held that the use of eminent domain to transfer property to a private party for redevelopment is constitutionally acceptable:

> "Once the object is within the authority of Congress, the right to realize that through the exercise of eminent domain is clear. *For the power of eminent domain is merely the means to the end.* (Citations omitted.) *Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area.* Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. (Citations omitted.) The public then may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. *We cannot say that public ownership is the*

> *sole method of promoting the public purposes of community redevelopment projects. * * * .*"

Berman, 348 U.S. at 33-34. (Emphasis added.)

The *Hawaii Housing* court also rejected the argument that it was improper to use eminent domain to take property for transfer to a private beneficiary:

> "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirements that condemned property be put into use for the general public. * * * In such cases, government does not itself have to use property to legitimate the taking; *it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.*"

Hawaii Housing, 467 U.S. at 243-244. (Emphasis added.)

C. A State Legislature Is Entitled To The Same Judicial Deference As The Federal Legislature In Determining Whether A Taking Serves A Public Purpose.

The Ohio Court of Appeal's rejection of petitioners' argument that the Alliance Council is entitled to less deference than the United States Congress in making public use determinations is also consistent with the decisions of this Court. This issue was specifically addressed by the *Hawaii Housing* case as follows:

> "Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. See *Berman v. Parker*, 348 U.S., at 32. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.
>
> *Hawaii Housing*, 467 U.S. at 244.

II. THE STATE COURT'S RESOLUTION OF STATE QUESTIONS ARE NOT WITHIN THE JURISDICTION OF THIS COURT.

Petitioners raise a number of issues in their petition regarding the construction and application of provisions of the Ohio Constitution and Ohio statutes relating to eminent domain. The Ohio Court of Appeal's decisions regarding these issues amount at most to alleged erroneous constructions of state law by that state's court. This Court does not have jurisdiction to review the state court's decision of any such questions. *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938); 28 U.S.C. § 1257.

CONCLUSION

For the above reasons, respondent respectfully requests the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 14 2001
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No. 01-522

IN THE

Supreme Court of the United States

SHEA ZELLWEGER and ALEIDA H. ZELLWEGER,

Petitioners,

v.

THE CITY OF ALLIANCE, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEALS, STATE OF OHIO

REPLY BRIEF

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FURTHER REASONS FOR GRANTING THE WRIT

I. "PUBLIC USE" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS NOT PRESENT WHEN THE PETITIONERS' PROPERTY WAS TAKEN BY THE RESPONDENT MUNICIPAL CORPORATION TO SATISFY A CONTRACTUAL OBLIGATION WITH A PRIVATE CORPORATE ENTITY.

The Respondent City, in its Brief in Opposition, continues to struggle with its expression of precisely what was the "public use" for which the Petitioners' home was taken through eminent domain. The best the Respondent can now suggest is that it was a "conceivable public purpose" to broadly provide for "public health." (Respondent's Brief, pp. 7-10). The Respondent City then fails to cite any case authority to support what has happened to Mr. and Mrs. Zellweger in the present case. That is because there is no authority, apart from the state court of appeals decision now under review, which holds that the taking of property, through eminent domain, for transfer to and use by a private hospital, passes muster under the Fifth Amendment to the United States Constitution.

The Respondent's Brief in Opposition ignores the decision of the Fifth District Court of Appeals for Ohio but instead incorrectly relies upon the judgment of the Common Pleas Court of Stark County, Ohio. The Fifth District Court of Appeals held that the City's utilization of eminent domain to improve the private hospital facilities was a "public use" and was a constitutional act. The state appellate court decision of "public use," based on Section 19, Article I, Ohio Constitution; Fifth Amendment and Fourteenth Amendment, U.S. Constitution, was not supported by its reliance upon *City of Huron v. Hanson*,

Erie App. No. E-99-060 (July 28, 2000); was not supported by the decisions as to a "public use" in *Gotsis v. Lorain Community Hospital*, 46 Ohio App. 2d 8 (1974) *and Davidson v. Youngstown Hosp. Assn.*, 19 Ohio App. 2d 246 (1969); and was not sustained by the factual differences present not only in *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27 (1954) but also in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

When the Respondent City relies upon the findings of the Common Pleas Court of Stark County, Ohio, it has included matters which were never contained in the lower court's decision and has stretched other portions of the decision beyond the actual language employed. The trial court made specific findings that a blighted or slum area did not exist as to the area in which Petitioners' property was located. The Respondent city used its eminent domain powers for the purpose of urban renewal and urban redevelopment. A portion of the lower court's pertinent findings are quoted below:

Findings of Fact:

> 4. Resolution No, 15-99 (Defendant's Exhibit F and Plaintiff's Exhibit 8) was adopted by the Council of the City of Alliance on February 1, 1999. This resolution declares the necessity and intent to appropriate the real estate described in Exhibit "A", which lists 19 owners by name, address and brief legal description. The resolution states that the enumerated real estate is needed
>
> > for purposes of urban renewal and redevelopment, to create jobs and employment opportunities and to improve the economic welfare of the people, and

> specifically for the construction of a new and expanded health care facility in accordance with the Health Care Facility Development Plan which was adopted by Ordinance No. 119-98 Substitute.

The following Finding of Fact, which recites findings previously made, contains the following additional language:

> 7. Ordinance No. 118-99 (Plaintiff's Exhibit 9 and Defendant's Exhibit H) was enacted by the council of the City of Alliance on August 16, 1999. . . . The language of this ordinance restates in part what has been enumerated in Resolution No. 15-99 and Ordinance No. 119-98S and it specifically provides in Section 1 that the City is directed to proceed to obtain the real estate described in Exhibit "A", which includes all of defendants' real property and other real property, for purposes of urban renewal and redevelopment, to create and preserve jobs, "and specifically for the construction of a new and expanded hospital. . . .
>
> . . .
>
> 17. Counsel for the landowners in their cross examination of city officials asked them if they considered the area in question to be a blighted or slum area subject to urban renewal? Each of the officials answered in the negative and agreed with defendant's counsel that the area in question did not contain any condemned structures that needed to be razed.
>
> . . .

Conclusions of Law

> 10. This court acknowledges the fact that the Bruestle case originated under an urban redevelopment project and although there is no question, that the defendant's property or general area subject to the eminent domain proceedings by the City of Alliance for the hospital project is not a blighted or slum area, it is clear from the testimony by city officials that if the hospital abandoned its current site it would have a negative impact on the adjacent areas as to value.
>
> . . .
>
> In an urban renewal or urban redevelopment project the appropriating authority is authorized to transfer the assembled lands for streets, utilities, public housing, recreational facilities and schools, to name a few public uses, and to lease or sell lands to redevelopment companies for profit development.

(Petition, Appendix B).

The trial court throughout its findings indicated that the result would be an "economic boost to the area," and that there would be a modern, acute care hospital for the citizens of the city. (Respondent's Brief, p. 4). *While admitting* in Conclusion of Law 15 that the phrases "urban renewal" and "urban redevelopment" were used not only in Resolution No. 15-99 but also in Ordinance No. 118-99, the trial court concluded that they were "not a basis for renovation of a blighted area." Eminent domain has been expanded by a municipal council to determine who best can put the property to its most economical use.

In essence, the Respondent City argues that we weigh the Petitioners' home use on an economic scale against a private corporate development. It essentially replaces the constitutional rule of law and scales of justice with the scales of macro economics and then proceeds to suggest that the United States Supreme Court is without jurisdiction in such a matter.

The specific language of the Respondent's municipal council, not only in its Resolution of Necessity to Appropriate on February 1, 1999 – " . . . urban renewal and development . . . construction of a new and expanded health care facility" but also in its Ordinance to File Petition for Appropriation on August 16, 1999 – "urban renewal and development . . . for the construction of a new and expanded hospital," was declared by the Ohio appellate court as being "moot." In the decision of the Ohio Supreme Court in *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13 (1953) and in this Court in *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27 (1954), the "public use" basis under the Ohio and United States Constitution was held to be sustained where blighted or slum areas were to be eliminated. The need to show the existence of such blight or slum area is a precondition to the exercise of the constitutional power of eminent domain as determined in the above-cited cases. This precondition has not been met in the present case.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), this Court, in sustaining the decision of the Hawaii legislature that elimination of the evils related to land ownership by a small number of persons – referred to as "oligopoly," – was a "public use," held firm to its principal that the exercise of eminent domain power must be related to a public purpose:

> But where the exercise of the eminent domain power is rationally related to a conceivable public purpose,

> the Court has never held a compensated taking to be proscribed by the Public Use Clause. . . . (Citations omitted).

Id.

The Ohio Court of Appeals held that the absence of stated purpose of the municipal council was immaterial, so long as the matter involved facilities for the good of the Alliance public. The absence of a legitimate purpose by the Respondent's council clearly indicates that the legislative judgment of what constitutes a public use was without reasonable foundation even when equated by the Ohio court with the police power. Even a limited judicial review which this Court has said it will entertain in *Hawaii Housing* would indicate that the asserted public use by the Respondent City had no reasonable foundation in fact:

> In short, the Court has made clear it will not substitute its judgment for a legislative judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." (Citations omitted).

Id., pp. 240-243. There was no reasonable foundation in the present case.

Section 719.01, Ohio Revised Code, cited by the appellate court does not authorize a municipal corporation to exercise the power of eminent domain for compensation or a fee or to provide land to a private corporation. The Respondent City admits that "a sales agreement" for the hospital land was entered into "conditioned on the City's successfully conducting eminent domain proceedings to acquire properties necessary for the hospital redevelopment." (Respondent's Brief, p. 5). The Ohio Constitution, Article I, Section 19, requires that where private

property is taken for public use, compensation must be paid, and also Article XVIII, Section 3, requires that upon the exercise of the powers of local government, a municipality may not exercise its powers in conflict with the general law. The Respondent is a municipality which cannot exercise its powers in conflict with the general law – in this case, the Constitutions of Ohio and the United States and the general law of the Ohio General Assembly.

On such an important question of federal law as the scope of the "public use" limitation of the Fifth Amendment, the state court of appeals decision for which a writ of certiorari is sought should not stand as the case of first impression on the taking of property for a private hospital. This Court should not be satisfied that the taking of the Petitioners' home for the use and benefit of a privately-owned hospital in the present case satisfies the Fifth Amendment to the United States Constitution. No case law supports such an expansive holding. Because no case law supports the taking here, the Respondent City even resorts to reliance upon law outside of the context of eminent domain, to suggest that its "conceivable public purpose" should be reviewed by the judiciary under an "arbitrary or unreasonable" standard. [Respondent's Brief, p. 6; citing Appendix 36a - the trial court's Conclusion of Law ¶8 which refers to *State ex rel. Gordon, City Atty. v. Rhodes*, 156 Ohio St. 81 (1951)]. The *Gordon v. Rhodes* case involved an issue relating to municipal bonds and, thus, has no application in the context of eminent domain. More than some speculative, tangential or theoretical "economic boost" to public health must be required as the appropriate legal standard in cases such as this, where eminent domain is involved. Otherwise, it is difficult to conceive the purposes to which eminent domain power is limited.

II. PRINCIPLES GOVERNING REVIEW ON CERTIORARI ARE SATISFIED IN THIS CASE.

Petitioners respectfully submit that review of this case by this Honorable Court, on certiorari, is warranted under the general principles governing review on certiorari.

The review of this case is merited under U.S. Supreme Court Rule 10(c). A state court has ignored the established preconditions for "public use." The action allowed a citizen's home to be taken without a "public use" and solely to fulfill a contract benefitting a private corporation otherwise possessing no such power of eminent domain. Such action violates a fundamental right provided in the Fifth Amendment and applicable to state entities by the Fourteenth Amendment to the United States Constitution. There has been a total denial of the citizens' rights under the Constitution.

The reliance placed on *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938) is misplaced as a basis for asserting that this Court has no jurisdiction. This Court held in *Neblett* that the holdings of the California courts concerned matters of state law and amounted at most to alleged erroneous construction of state statutes by its own court of last resort. Such decisions were not a denial of due process guaranteed by the Fourteenth Amendment. The situation in the present case is that the Ohio Fifth District Court of Appeals found that the Respondent's utilization of eminent domain to allow a private corporation to improve hospital facilities within the city was not an unconstitutional act. This presents a far different case for review, since the Fifth Amendment to the United States Constitution is directly involved here.

The Respondent's reliance upon U.S. Supreme Court Rule 12(b) is misplaced, inasmuch as the rule is improperly cited.

Petitioners have raised an important question involving the federal constitution as well as decisions made by this court so that jurisdiction on the writ of certiorari should be granted.

At all stages of this case, the Petitioners have presented their Fifth Amendment challenge to the utilization of eminent domain at issue here. The present case has the complete record and appropriate context to address the important issue of the application of the taking of private property when a public use is not involved.

CONCLUSION

WHEREFORE, the petitioners, Shea Zellweger and Aleida H. Zellweger, respectfully request this Court issue a writ of certiorari to review the judgment and opinion of the Ohio Fifth District Court of Appeals entered in this action on March 12, 2001.

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